



disability and medical compensation but denied an award of permanent partial disability compensation.

The claimant requests review of the nature and extent of disability. Specifically, claimant argues the injury to her left knee was the natural and probable consequence of her prior two right knee injuries. Claimant further argues respondent failed to meet its burden of proof that she suffered from any preexisting impairment to her lower extremities. Accordingly, claimant argues she suffered a whole body functional impairment rather than separate scheduled disabilities to each lower extremity.

Conversely, the respondent argues the claimant suffered three separate accidents and that the accidental injury to her left knee was a new and distinct accident rather than a natural progression of the minor injuries claimant suffered to her right knee. Respondent argues claimant was symptomatic and received treatment for her lower extremities before her work-related accidents and as a result respondent further argues it established claimant suffered from a preexisting impairment. Accordingly, respondent requests the Board to affirm the ALJ's Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is essentially undisputed claimant suffered three separate work-related accidents. The first accident occurred on March 9, 2002, when she slipped on a wet floor and fell. Claimant indicated that she landed on her hands and knees. A contemporaneous injury report signed by claimant described injury to the right side of her neck, right arm and that she twisted her right leg and ankle.<sup>1</sup> At the regular hearing, claimant noted she injured her right knee but did not seek any medical treatment as a result of this accident.

The second accident occurred on August 6, 2002, when claimant struck her right knee on the table leg while sliding into a booth in the respondent's employee dining room. Claimant received medical treatment from respondent's medical personnel and was then referred to her personal physician for additional treatment. Claimant initially saw Dr. John Gilbert but respondent then notified claimant that her treatment was to be provided by Dr. Donald T. Mead. Claimant was diagnosed with osteoarthritis of the right knee with a superimposed acute strain. Claimant was provided conservative treatment. An evaluation with Dr. Kenneth L. Wertzberger was scheduled.

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<sup>1</sup> R.H. Trans., Ex. A.

Before claimant saw Dr. Wertzberger for evaluation and treatment of her right knee she suffered the third accident. On September 6, 2002, claimant fell in respondent's parking lot. A contemporaneous incident report notes the cause of the fall was "uneven pavement" and that claimant injured her left knee.<sup>2</sup> But claimant later testified that her right knee gave out causing her to fall onto both knees. Claimant received treatment from Dr. Meade and provided a history that her legs gave out. Claimant was treated for abrasions and bruises on the left knee.

Dr. Wertzberger, a board certified orthopedic surgeon, provided treatment to claimant after she suffered her third accident at work. Dr. Wertzberger initially saw claimant on October 8, 2002. The history that claimant provided Dr. Wertzberger regarding the third accident was that she slipped on the sidewalk and fell, with her knee giving way. Dr. Wertzberger was under the impression that claimant felt the leg was buckling or weak and gave way when she slipped.

Dr. Wertzberger diagnosed bilateral acute knee strain, superimposed upon medial compartments, degenerative arthritis worse on the right. Dr. Wertzberger prescribed anti-inflammatory medication as well as Synvisc injections to both knees. Claimant also received physical therapy for back complaints which then resolved. Dr. Wertzberger noted that claimant had improvement in her left knee following treatment. When Dr. Wertzberger released claimant from treatment on January 20, 2003, claimant noted that her left knee was not symptomatic. Dr. Wertzberger concluded claimant suffered a 5 percent permanent partial functional impairment to each knee. And that claimant's preexisting osteoarthritis was aggravated by the accidents. The doctor concluded the right knee impairment was due to the first two accidents and the left knee impairment was due to the third accident.

X-rays taken in July 1998 had revealed a narrowing of the medial joint compartment of claimant's right knee. Although claimant testified that her legs gave out Dr. Wertzberger noted the only complaint claimant had made in the medical records regarding giving out or weakness in her knees was in 1997 or 1998. Dr. Wertzberger agreed that the AMA guidelines require that under the definition of impairment a condition must be symptomatic in order to be ratable.

At the ALJ's request, the claimant was examined by Dr. Sergio Delgado on July 15, 2003. Dr. Delgado noted that review of claimant's medical records indicated that she suffered from a preexisting condition of degenerative arthritis in both knees before the three accidents. Upon examination, the doctor diagnosed claimant with bilateral degenerative arthritis in her knees with aggravation due to the accidents. Dr. Delgado noted that there can be a preexisting condition without impairment and the differentiating

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<sup>2</sup> R.H. Trans., Ex. D.

factor according to the *AMA Guides*<sup>3</sup> is a requirement that for impairment the condition must be symptomatic.

Q. Okay. Is there a difference between a preexisting condition and a preexisting impairment?

A. You can have a preexisting condition without an impairment.

Q. Okay. And what is the differentiating factor or factors between a preexisting condition and a preexisting impairment?

A. The impairment has been described through the *AMA guides* requires if nothing else symptoms.

Q. Okay.

A. Just because an individual has a physical condition it can be called an impairment, but when you use the *AMA guides* it refers to somebody having symptoms in order to be rated for impairment.<sup>4</sup>

Between 1998 and her first injury while working for respondent there is no medical record that claimant had any continuing problem or treatment for her knees. Dr. Delgado concluded that upon review of claimant's medical records she had a preexisting arthritic condition in both knees but did not have any preexisting impairment.

Dr. Delgado testified:

Q. Just because she had a short period of time in which she had pain in either the right or left knee and she recovered from that, does that equate to an impairment?

A. No.

Q. Okay. Is there any indication in any of the previous medical records, therefore, that prior to these injuries she had a preexisting impairment versus a preexisting condition?

A. I do not believe she had an impairment as she was able to function fully during those four years. Unless - - and I put that specifically in my last report - - unless there's evidence that she was taking medication, or had any activities in relation to subsequent use of braces or orthotics, [sic] use of medication, applying for a disability tag, use of handicapped parking facilities and also, and her ability to

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>4</sup> Delgado Depo. at 44.

continue work activities without restrictions until her workers' compensation claim. So I tried to cover all the bases.<sup>5</sup>

Dr. Delgado concluded claimant suffered a 25 percent functional impairment to each knee which converted to a 19 percent whole person functional impairment. The doctor related all of the functional impairment to the claimant's three accidental injuries.

At her attorney's request, claimant was examined by Dr. Edward J. Prostic on March 14, 2003. Dr. Prostic diagnosed claimant with osteoarthritis in her knees. The doctor concluded this condition was aggravated by her falls at work. Dr. Prostic opined claimant suffered a 20 percent functional impairment to the left leg and a 35 percent functional impairment to the right leg which converted to a 21 percent whole person functional impairment. Lastly, the doctor concluded claimant did not have any preexisting functional impairment.

At respondent's attorney's request, the claimant was examined by Dr. Steven L. Hendler on January 30, 2003. Dr. Hendler diagnosed claimant with osteoarthritis in both knees. The doctor concluded that condition was not causally related to any of claimant's three accidents and predated those incidents. And the doctor further opined that the accidents at work did not permanently aggravate or intensify claimant's preexisting osteoarthritis in either knee or cause impairment. Lastly, Dr. Hendler concluded the records did not support claimant's contention that her leg gave out and caused the third fall.

Q. Were any of the incidents that occurred at Harrah's sufficient to cause a giving way of the knees such that she would have been - - such that she could have fallen as she did in the parking lot?

A. Well, what I would say is that prior to the fall which was in September, there were no findings of problems with the left knee so there would be nothing in the records to suggest that any problem from work would relate to the left knee giving way. The description of the right knee problem and the progression in the records would suggest strongly against it being impaired enough to have caused to give way as a result of a strain-type injury.<sup>6</sup>

But Dr. Hendler agreed there was nothing in the medical records to indicate that claimant's osteoarthritis was symptomatic before the first accident at work. And based upon the definition of impairment contained in the *AMA Guides*, the doctor further agreed claimant did not have a condition that interfered with claimant's activity of daily living. But

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<sup>5</sup> Id. at 45-46.

<sup>6</sup> Hendler Depo. at 23.

Dr. Hendler concluded the *AMA Guides* allow for rating of functional impairment even though the underlying condition is asymptomatic.

Claimant argues the third fall and injury to the left knee was a natural and probable consequence of the right knee injuries. Claimant argues that she fell because her right knee gave out and buckled causing her to fall. Consequently, claimant argues she is entitled to a whole person functional impairment. Interestingly, respondent argues claimant suffered three separate scheduled injuries.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>7</sup> It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.<sup>8</sup>

The contemporaneous incident report completed after claimant's third fall indicated that uneven pavement in the respondent's parking lot caused the fall. Claimant later testified that her right knee gave out and she fell. The claimant told Dr. Meade that her legs gave out causing her to fall. It should be noted that before the third fall claimant testified that she had no left knee problems which calls into question why both legs would give out.

Claimant then told Dr. Wertzberger that she had slipped and her leg gave way causing the fall. Dr. Wertzberger concluded claimant was saying she slipped and then her leg buckled or gave way. Claimant provided Drs. Delgado and Prostic with a history that her right leg gave out causing the fall.

The claimant received minimal medical treatment after the second incident where she jammed her right knee into the table leg. It was not until after the third incident involving the left knee that claimant received a significant course of medical treatment. Although Dr. Wertzberger testified that preexisting knee conditions such as claimant had can cause the knees to buckle or give way, he did not testify that such event did happen or was a natural and probable consequence of the claimant's previous right knee injuries. And Dr. Hendler noted that a review of claimant's medical records would not support a finding that the knees giving out or buckling, if such was the cause of the third fall, was a natural progression of the first two right knee injuries.

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<sup>7</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

<sup>8</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

The ALJ concluded claimant had failed to establish that the third fall was in any way related to the previous two accidents claimant had suffered while working for the respondent. The Board agrees and affirms the ALJ's finding that claimant suffered three separate scheduled injuries to her knees.

The ALJ adopted the rating of the court appointed medical examiner, Dr. Delgado, that claimant suffered a 25 percent permanent partial scheduled disability to each lower extremity. The Board affirms that finding.

Respondent next argues that claimant's preexisting osteoarthritis was neither worsened nor did she suffer increased disability as a result of the three falls claimant suffered at work. Accordingly, respondent argues claimant is not entitled to any additional compensation for permanent partial functional impairment.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of **functional** impairment determined to be preexisting.<sup>9</sup> (Emphasis Added)

And functional impairment is defined by K.S.A. 44-510e(a) (Furse 2000), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) (Furse 2000) requires that functional impairment be determined based upon AMA *Guides*, Fourth Edition. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria and this approach has been upheld by the Court of Appeals.<sup>10</sup>

The standard used to determine functional impairment percentage in Kansas has changed over the years from competent medical evidence to the mandated use of the AMA *Guides*, Third Edition Revised and then to the AMA *Guides*, Fourth Edition. Accordingly,

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<sup>9</sup> K.S.A. 44-501(c) (Furse 2000).

<sup>10</sup> *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003). Copy attached pursuant to Sup. Ct. Rule 7.04.

any preexisting functional impairment must be adjusted to conform to the present standard. Stated another way, a preexisting functional impairment rating provided using a different version of the *AMA Guides* or simply based upon competent medical evidence without any reference to the *Guides* must be adjusted or converted to a rating under the *AMA Guides*, Fourth Edition, in order to qualify for a K.S.A. 44-501(c) (Furse 2000) deduction.

Requiring the application of the same standard in the determination of both the preexisting as well as the current functional impairment percentage results in a final comparison of equal value percentages. Simply stated, it requires an apples to apples comparison. This accomplishes a fair comparison in order to meet the statutory mandate to only compensate for the increased disability caused by the current injury. Otherwise, reliance upon percentages derived using different standards potentially provides a final comparison of unequal values. Simply stated, that would be an apples to oranges comparison.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) (Furse 2000) reduction. In *Mattucci*<sup>11</sup>, the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. **The rating for a prior disability does not establish the degree of disability at the time of the second injury.**" 241 Kan. at 593. (Emphasis added)

It should be recognized that the determination of a functional impairment percentage by a physician is not an exact science. Nor is the number assigned an absolute. An impairment percentage represents an informed estimate and different physicians evaluating the same person, using the same standard, can arrive at widely divergent percentages of functional impairment ratings. An injured worker's condition can improve or worsen with the passage of time. Again, that is why the determination of the preexisting functional impairment percentage at times requires review of numerous factors and the evidence that a claimant has previously received a functional impairment rating is, at times,

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<sup>11</sup> *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000). Copy attached pursuant to Sup. Ct. Rule 7.04.



not absolutely controlling. Moreover, a functional impairment percentage agreed upon as part of a lump sum compromise settlement may take into consideration many factors unrelated to the functional impairment percentage, such as the rights to future medical treatment or review and modification.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. Additional factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of his activities in the intervening years in order to determine the preexisting impairment.<sup>12</sup> Those factors must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

As previously noted, Dr. Delgado, the court ordered independent medical examiner, noted that an individual can have a preexisting condition without an impairment. And according to the *AMA Guides*, the condition must cause symptoms before it can then be a ratable impairment. When the doctor reviewed claimant's medical records he noted claimant had a history of treatment to her right knee but then no further treatment in the intervening four years until the first fall while working for respondent. As a result of that history the doctor concluded claimant did not have a preexisting impairment.

Dr. Wertzberger agreed that the *AMA Guides* require a preexisting condition to be symptomatic before it can be a ratable impairment. And he noted that claimant had provided a history of no significant problems with her knees before the three work-related falls. Consequently, the doctor did not offer an opinion regarding any percentage of preexisting functional impairment. Dr. Prostin also opined that claimant did not have any preexisting functional impairment.

Conversely, Dr. Hendler concluded all of claimant's current condition was preexisting her three work-related falls. However, as previously noted, Dr. Hendler agreed there was nothing in claimant's medical records to indicate claimant's osteoarthritis was symptomatic in the four years before her three accidents at work with respondent. And the doctor agreed that based upon the definition of impairment in the *AMA Guides* the claimant would not have a condition that interfered with her activities of daily living.

The ALJ concluded that claimant's preexisting osteoarthritis in her knees was symptomatic based upon the testimony of two co-workers. Because her condition was symptomatic the ALJ concluded it interfered with claimant's activities of daily living. Consequently, the ALJ concluded claimant's entire functional impairment was preexisting.

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<sup>12</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001).

A co-worker, Yvonne Ehrhart, noted claimant had complained on a daily basis that she had arthritis and pain in her knees. Ms. Ehrhart did note claimant had a hard time getting up and would groan but she agreed it could have been from something other than her knees. But Ms. Ehrhart further noted claimant never had any problems performing her job nor did claimant miss work because of any physical problems. And Ms. Ehrhart never observed claimant taking medications or limping. Stated another way, whatever complaints claimant voiced, they did not interfere with her activities of daily living.

Claimant's supervisor, Christine Roepke, noted that in general casual conversation the claimant had mentioned she had arthritis in her knees. But the conversation was matter of fact and claimant did not say the condition was bothering her. And claimant had no problems performing her job duties. Again, there was no indication that the mentioned arthritis interfered with claimant's activities of daily living.

All the doctors agreed that after claimant received treatment for either her right or left knee in 1998 there was no further treatment for either knee in the intervening four years until after the second accident at work on August 6, 2002. In spite of whatever complaints claimant voiced to her co-workers they agreed that claimant was able to perform her daily work without any interference with her activities. Although claimant may have commiserated with her co-workers when they mentioned their weight or pain with standing at work, there is no indication in the record that claimant's voiced complaints were more than just casual conversation. The claimant did not seek medical treatment for her knees for four years and everyone agreed that although she complained she was able to perform all her job duties without limitation.

The Board finds persuasive the opinions of Drs. Delgado, Wertzberger and Prostic that claimant did not have a ratable preexisting impairment. Consequently, the Board reverses the ALJ's finding that claimant's functional impairment was all preexisting and finds respondent has failed to meet its burden of proof that claimant suffered from a preexisting functional impairment.

The claimant is entitled to compensation for two separate scheduled injuries to her right and left leg. The claimant is entitled to compensation for a 25 percent permanent partial scheduled disability to the right lower leg as a result of the accident on August 6, 2002. The claimant is further entitled to compensation for a 25 percent permanent partial scheduled disability to the left lower leg as a result of the accident on September 6, 2002.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 1, 2004, is modified to reflect respondent failed to establish claimant suffered preexisting impairment in her knees and affirmed in all other respects.

The claimant is entitled to 50 weeks of permanent partial disability compensation, at the rate of \$353.78 per week, in the amount of \$17,689 for a 25 percent loss of use of the right leg, making a total award of \$17,689.

The claimant is entitled to 5.14 weeks of temporary total disability compensation at the rate of \$353.78 per week in the amount of \$1,818.43 followed by 48.72 weeks of permanent partial disability compensation, at the rate of \$353.78 per week, in the amount of \$17,236.16 for a 25 percent loss of use of the left leg, making a total award of \$19,054.59.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
D'Ambra Howard, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director